88-484

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No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

STATE OF CONNECTICUT, ET AL.,
Petitioners,

v.

DONNELL COUNSEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether Congress has the authority under its spending power in Article I, Section 8 to impose retroactive attorneys' fees in concluded cases or other retroactive financial obligations on States which have received money under federal/state grant programs?

2. Whether the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*, is legislation passed pursuant to Congress' power to enforce the requirements of the Fourteenth Amendment and, therefore, legislation which Congress can amend to impose retroactive financial obligations on the States?

LIST OF ALL PARTIES

The petitioners in this matter are the State of Connecticut; Gerald N. Tirozzi, Commissioner of Education for the State of Connecticut; Joyce C. Driskill, Hearing Officer; Connecticut Department of Education; and Connecticut State Board of Education.

The respondent is Donnell Counsel.

Other parties below were John Dow, the Superintendent of the New Haven Public Schools, and the New Haven Board of Education. These last named parties no longer have an interest in this case as the judgment entered against them in the District Court was reversed by the Court of Appeals.

STATEMENT REGARDING THE APPLICABILITY OF 28 U.S.C. § 2403(A)

In this proceeding the petitioners ask the Court to grant their petition for writ of certiorari so the court may review the constitutionality of § 5 of P.L. 99-372 which retroactively imposes an obligation on State and local educational agencies to pay attorneys' fees in cases concluded before P.L. 99-372 became law. Neither the United States nor any department, office, agency, officer, or employee thereof is a party to this action.

By letter dated November 23, 1987 the Clerk of the United States Court of Appeals for the Second Circuit formally notified the United States Attorney General that the constitutionality of a portion of the Education of the Handicapped Act, 28 U.S.C. § 1400 *et seq.*, was being called into question in this case. The Department of Justice was given until December 7, 1987 to submit written arguments to the Second Circuit. No written arguments were filed.

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No. _____

In The

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OCTOBER TERM, 1988

STATE OF CONNECTICUT, ET AL.,
Petitioners,

v.

DONNELL COUNSEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on June 10, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is officially reported *sub nom. Counsel v. Dow, et al.*, at 849 F.2d 731 and is reprinted in the Appendix beginning at page 2A.

The opinion of the United States District Court for the District of Connecticut which was issued on May 28, 1987 *sub nom. Counsel v. Dow, et al.*, is officially reported at 666 F.Supp. 366 and reprinted in the Appendix beginning at page 22A.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1988. No petitions for rehearing or requests for an extension of time within which to file a petition for writ of certiorari have been filed. This Court has jurisdiction to review by writ of certiorari the judgment of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1). The petition has been filed within the time allowed by law.

STATUTES AND CONSTITUTIONAL PROVISIONS

In this case the petitioners question the constitutionality of a portion of the Handicapped Children's Protection Act of 1986, P.L. 99-372, 100 Stat. 796 (1986), partially codified[1] at 20 U.S.C. § 1415(e)(4)(B-G), which retroactively imposes an obligation on State and local educational agencies to pay attorneys fees in court cases and administrative proceedings concluded in the two-year period before the Act became law. The relevant portions of the Act are set forth beginning on page 31A of the Appendix.

Other relevant portions of the Education of the Handicapped Act (EHA) are found at 20 U.S.C. §§ 1400, 1401, 1412, 1413, 1414, 1415 and 1416 and reprinted in the Appendix beginning at page 29A.

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[1] Section 5 of P.L. 99-372 which sets the retroactive effective date of Section 2 is not codified.

Relevant provisions of the United States Constitution are Article I, Section 8, cl. 1 and the Fourteenth Amendment, which are reprinted in the Appendix beginning at page 60A.

STATEMENT OF THE CASE

In *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457, 82 L.Ed. 2d 746 (1984), decided in July of 1984, this Court resolved any question which may have existed at the time regarding whether attorneys' fees could be obtained by a plaintiff who prevailed in an action brought to enforce rights guaranteed by the Education of the Handicapped Act (EHA), 20 U.S.C. § 1400 *et seq.* The Court found that Congress did not intend to allow such awards.

In November 1985, well over a year after the *Smith* decision, and after the respondent was unsuccessful in vindicating rights he claimed under the EHA through administrative proceedings instituted on his behalf against the New Haven Board of Education, the respondent brought this federal court action.[2] In addition to naming the New Haven Board of Education and the Superintendent of the New Haven Public Schools as defendants, the respondent named the State of Connecticut and several state agencies and officers (Petitioners here). At all times relevant to this case the respondent was represented by the Jerome N. Frank Legal Services Organization of the Yale University School of Law, hereafter referred to as Yale.

Shortly after the suit was filed the State initiated settlement negotiations. An agreement was reached by which the State, without admitting that the plaintiff's rights had been violated, undertook a number of activities and made a number of financial commitments which made settlement of the case possible. The agreement made no mention of attorneys'

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[2] The administrative proceedings were conducted in accordance with 20 U.S.C. § 1415 (c)–(d).

fees. After reaching agreement the parties submitted the settlement to the District Court for its approval. On July 18, 1986 the District Court entered the agreement as a Consent Decree.

On August 6, 1986, a number of weeks after the District Court approved the settlement, the Handicapped Childrens' Protection Act of 1986, P.L. 99-372, 100 Stat. 796 (1986), became law.[3] The stated purpose of this Act was to make attorneys' fees available in cases brought to enforce rights under the EHA. The Act was subsequently interpreted to make attorneys' fees available to people who prevailed in administrative proceedings under 20 U.S.C. § 1415 (c)-(d), regardless of whether further court action was necessary, as well as people who qualified as prevailing parties in court actions. *Burpee v. Manchester School District,* 661 F.Supp. 731 (D NH 1987), *Kristi W. v. Graham Independent School District,* 663 F.Supp. 86 (ND TX 1987). The legislative history of the Act also indicated an intent by Congress to prohibit State and local educational agencies from using money provided under the EHA to pay any part of these awards of attorneys' fees.[4]

Section 5 of the Act made the right to obtain attorneys fees retroactive for over two years so as to apply to Court cases and administrative proceedings pending on July 4, 1984 and those filed after July 3, 1984. Although President Reagan signed the bill into law he did so only after expressing serious

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[3] Because P.L. 99-372 became law after this case was fully resolved by entry of the consent decree the case is very different from *Bradley v. Richmond School Board,* 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). In that case the issue before the Court was the applicability of legislation creating a right to attorneys' fees to cases still pending when the new legislation went into effect.

[4] "The conferees wish to emphasize that existing law bars payment of attorneys' fees with funds appropriated under . . . EHA." Joint Explanatory Statement of the Committee at Conference, House Report 99-687, 7 U.S. Cong. & Admin. News 1986 at 1809.

reservations about the legality of this retroactive effective date.[5]

In November 1986, fueled by the retroactive effective date in Section 5 of P.L. 99-372, Yale filed an application with the District Court in the respondent's name for an award of attorneys' fees. The petitioners stipulated that the respondent met the criteria for a "prevailing party" and that the amount of fees which Yale sought was reasonable.[6] The application for fees was contested solely on the grounds that Congress lacked the authority to make the newly-established right to attorneys' fees retroactive.

The District Court rejected the petitioners' argument that the retroactive attorneys' fees provision was unconstitutional. The Court of Appeals did the same, although the Court of Appeals reversed the District Court to the extent that the District Court found that the respondent prevailed as to the New Haven defendants. In rejecting the petitioners' argument regarding the constitutionality of § 5 of P.L. 99-372, the Court of Appeals said that Congress could impose retroactive obligations on States which received money under federal/state grant programs like the EHA so long as Congress did so unambiguously and so long as a rational legislative purpose could be found for the legislation. The Court found a rational legislative purpose for the retroactive legislation under consideration here in Congress' desire to see that families of

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[5] In his comment upon signing the Bill the President said:

> . . . I have serious reservations concerning section 5 of the Act. . . . The retroactive application of the Act to cases that are no longer pending permits the Congress to displace the judicial function by interfering with a final judgment. To do so disturbs the settled expectations of the parties and the traditional finality that our society has accorded court decisions. Moreover, it is not clear what rational basis there is for imposing attorneys' fees in cases that have been settled or finally adjudicated.

7 U.S. Cong. and Admin. News 1986 at 1811.

[6] The amount of fees requested at that time was $2,633.

handicapped children and legal aid organizations were reimbursed for expenses incurred in cases brought under the EHA.

Petitioners seek review of the decision by the Court of Appeals that Congress may impose retroactive financial obligations on States which have received money under federal/state grant programs like the EHA.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW RELATING TO THE POWER OF CONGRESS TO IMPOSE RETROACTIVE FINANCIAL OBLIGATIONS ON STATES WHICH HAVE RECEIVED MONEY UNDER A FEDERAL/STATE GRANT PROGRAM.

1. Substantial State Interests Are At Stake In The Precedent Set By The Legislation In Question.

The precedent set by Congressional efforts to make the new right to attorneys' fees created by P.L. 99-372 retroactive for more than two years has both immediate and long-term adverse consequences for the States. The immediate consequence is that State and local educational agencies across the country are now being asked to pay attorneys' fees in hosts of court cases and administrative hearings concluded during a two-year period when the law clearly said that no such fees could be recovered.[7] These expenses will have to be paid unless the Court reviews and reverses the decision of the Second Circuit. See *J.G. v. Board of Education of Rochester City*, 648 F.Supp. 1452 (W.D.N.Y. 1986) (Court denied a request for attorneys' fees before P.L. 99-372 became law and afterwards awarded almost a quarter million dollars).

The long-term consequence of sustaining Congress' attempt to impose retroactive financial obligations on the States is even more disturbing. If Congress may impose retroactive financial obligations on the States because the States previously accepted federal money under a federal/state grant

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[7] Approximately 60 administrative hearings were conducted in Connecticut during the two-year period of retroactivity. It is projected that awards of attorneys' fees could be made in more than half of these cases. In addition it seems that the law will affect a dozen or more court cases in the State.

program, and Congress may even provide that the retroactive financial obligations must be paid exclusively out of State and local funds, the States will never be able to make a knowing decision whether or not to participate in such a program. They will never be able to know whether the benefits of participation in a federal/state grant program justify acceptance of the conditions because they will never know for sure what those conditions are. If the decision of the Court of Appeals stands, Congress could add additional conditions and financial obligations so long as it is pursuing a rational legislative purpose. By accepting money under a federal/state grant program the States will, in effect, be giving Congress a blank check drawn on State and local treasuries to be used by Congress whenever it decides to expand the obligations of the States under the grant program.[8]

Prospective changes in federal/state grant programs give the States the appropriate opportunity to consider whether continued participation in the program is in the State's best interest or whether the newly-adopted condition is simply too burdensome or intrusive. Retroactive changes in these same programs are very different. Since the States have already accepted and used the money to which the retroactive condition is attached, retroactive changes give the State no options. Congress in such instances is simply acting to impose its will on the States.[9]

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[8] If the retroactive change in the obligations of State and local educational agencies under consideration in this case is upheld, there would, for example, seem to be nothing to stand in the way of a Congressional decision retroactively to expand the range of those eligible for Medicaid and/or the range of services available under that program, leaving the States to pick up the hefty costs of such expansion.

[9] Congress could use this claimed power to add retroactive conditions to direct the State in ways which it might otherwise be precluded from doing so. "Since *Steward Machine Co. v. Davis,* 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937) and *Helvering v. Davis,* 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307 (1937), . . ., it has been settled that Congress can use its spending powers to coerce conduct consistent with its views of the general welfare in ways that it perhaps could not otherwise command." *U.S. v. Perry,* 788 F.2d 100, 109 (3rd Cir. 1986).

It is important for this Court to resolve the question of whether Congress can impose the retroactive obligation on State and local educational agencies to pay attorneys' fees in court cases and administrative hearings concluded before P.L. 99-372 became law so that State and local educational agencies will know whether they must pay the host of claims for attorneys' fees now being presented to them. It is more important to resolve this issue so that Congress and the States will be able to understand fully the rights and obligations under which they are acting with respect to the broad range of federal/state grant programs now under way.

2. The Decision By The Court Of Appeals Is At Odds With The Opinion Of This Court In *Pennhurst v. Halderman*, 451 U.S. 1, And The EHA Itself.

By upholding Congress' attempt to impose a retroactive condition on a federal/state grant program which involves the expenditure of State and local funds, the Court of Appeals has drawn into question the reasonable belief by the States that the conditions under which they accepted federal money were fixed when the money was accepted. This expectation was fostered in an important way in *Pennhurst v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed. 2d 694 (1981), hereafter referred to as *Pennhurst I*. In that case the Court said that "[t]hough Congress' power to legislate under the spending powers is broad, *it does not include surprising participating states with post-acceptance or 'retroactive' conditions.*" *Id.* at 25 (emphasis added).

The decision below stands in stark contrast to the *Pennhurst I* decision. In this case the Court of Appeals concluded that Congressional spending power included the power to

impose "post-acceptance or ' etroactive' conditions" on the States so long as the retroactive conditions were unambiguous.[10]

The Court of Appeals, in an effort to support the constitutionality of § 5 of P.L. 99-372 despite possible limitations on the spending power, went on to say that even if Congressional spending power did not include the power to impose retroactive conditions on the States, the retroactive legislation under consideration in this case could be justified as an exercise of Congress' power to enforce the Fourteenth Amendment. While it may be true that when Congress passes legislation to enforce rights guaranteed by the Fourteenth Amendment its power to make obligations created by that legislation retroactive is not as limited as when Congress acts pursuant to its spending power, this point has no bearing on the present case because the EHA is not, as the Court of Appeals concluded, Fourteenth Amendment legislation.

In reaching its conclusion that the EHA was Fourteenth Amendment legislation the Court of Appeals again ran afoul of this Court's decision in *Pennhurst I.* In *Pennhurst I* the Court warned against quickly concluding, for the purpose of justifying the involuntary imposition of financial burdens on the States, that a particular piece of legislation was passed pursuant to the power to enforce the Fourteenth Amendment. *Id.* at 16. The Court then held that the Developmentally Disabled Assistance and Bill of Rights Act, which has been directly analogized to the EHA,[11] was not Fourteenth

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[10]In large part the decision of the Court of Appeals was based on the premise that *Pennhurst I* does not apply to the EHA. However, in *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley,* 458 U.S. 176, 191 n. 11, 205 n. 26, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), this Court specifically applied the *Pennhurst I* principles to the EHA.

[11]"The EHA, like the DDA, creates a federal/state grant program under which the federal government provides financial assistance to participating states to aid them in creating programs to educate the handicapped. Compliance with both statutes is voluntary; states are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of federal funding. The two statutes are similar in their goals, organizational structure and the specific language of the funding provisions." *Darlene L. v. Illinois State Board of Education,* 1982-83 E.H.L.R. DEC. 554:532, 534 n.4 (N.D. Ill. 1983).

Amendment Legislation. The Court of Appeals ignored this Court's caution against quickly concluding that an act was passed pursuant to the Fourteenth Amendment and ruled that the EHA was Fourteenth Amendment legislation despite its similarities to the Developmentally Disabled Assistance and Bill of Rights Act.

The decision that the EHA was passed pursuant to the Fourteenth Amendment is at odds not only with *Pennhurst I,* but with the structure of the EHA itself. The right to a "free appropriate public education,"[12] which is the object to which all other rights created by the EHA are directed, was phased in over a three-to-five-year period. *See* 20 U.S.C. §§ 1412(2)(B) and (3). Obviously constitutional rights cannot be phased in. By providing this phase-in period Congress clearly recognized in the structure of the Act that it was creating new rights and not enforcing existing requirements of the Fourteenth Amendment. Congress merely conditioned the receipt of federal money on State recognition of these new rights as it normally does when it is exercising its spending powers.[13]

In his concurring opinion in *Fitzpatrick v. Bitzer,* 427 U.S. 445, 458, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), Justice Stevens recognized the need to look at the rights protected by the Act in question to determine the source of Congressional power

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[12]This right is defined in 20 U.S.C. § 1401 (18)-(19).

[13]20 U.S.C. § 1412(1) says that:

> "In order to qualify for assistance under this subchapter in any fiscal year, a state shall demonstrate to the Secretary that the following conditions are met:
>
> (1) The state has in effect a policy that assures all handicapped children the right to a free appropriate public education."

Establishment and maintenance of such a policy is not something which Congress needed to mandate in this way if the obligation already existed by reason of the Fourteenth Amendment.

to adopt that particular piece of legislation.[14] The Second Circuit did not follow Justice Stevens' approach when it considered whether the EHA was Fourteenth Amendment legislation. Instead the Court relied exclusively on oblique references to "equal protection" in the Congressional Statements and Declarations, 20 U.S.C. § 1400(b)(9), and the legislative history of the EHA. A proper application of Justice Stevens' approach would lead to the opposite finding because the rights enforced by the EHA are not constitutional rights. *See Gallagher v. Pontiac School District,* 807 F.2d 75, 79 (6th Cir. 1986) (court rejected a claim by a handicapped child that he was entitled to rights like those guaranteed by the EHA under the equal protection clause of the Fourteenth Amendment saying that the child "did not have a constitutional right to the most appropriate education that would have assured him of progress in light of his disability."). *See also San Antonio School District v. Rodriguez,* 411 U.S. 1, 16, 33-36, 93 S.Ct. 1278, 36 L.Ed. 16 (1973) (court held that the Constitution does not guarantee the right to an education).

In *Pennhurst I, supra,* at 16, the Court noted that it has had "little occasion" to consider the appropriate test for determining when Congress has acted to enforce the guarantees of the Fourteenth Amendment. This case provides the court with an opportunity to decide whether the approach used by the Second Circuit or some other approach, such as that used by Justice Stevens, is the appropriate method for identifying when legislation is enacted pursuant to the Fourteenth Amendment.

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[14]Even though the parties had not raised the issue Justice Stevens indicated he could not accept the premise that the Title VII legislation in question in that case was passed pursuant to Congressional power under the Fourteenth Amendment. Because he could not find a violation of the Fourteenth Amendment he felt compelled to look at Congress' power under the interstate commerce clause to find justification for the legislation.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

STATE OF CONNECTICUT, ET AL.

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Judgment of the United States Court of Appeals for the Second Circuit in *Counsel v. Dow, et al.*, D.N. 87-7518, 87-7534 ..... 1A

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Judgment With Regard to Attorneys' Fees of the United States District Court for the District of Connecticut in *Counsel v. Dow, et al.*, Civ. No. N-85-577 (AHN) 21A

Ruling on Motion For Attorneys' Fees By The United States District Court for the District of Connecticut in *Counsel v. Dow, et al.*, Civ. No. N-85-577 (AHN) 22A

RELEVANT STATUTES:

Handicapped Children's Protection Act of 1986, P.L. 99-372, §§ 2, 5 (relevant portions) 29A

Education of the Handicapped Act (EHA), 20 U.S.C. §§ 1400, 1401, 1412, 1413, 1414, 1415, 1416 (relevant portions) 31A

RELEVANT CONSTITUTIONAL PROVISIONS:

Article I, Section 8, cl. 1 ..... 60A

Fourteenth Amendment 60A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, 10007
June 10, 1988

ELAINE B. GOLDSMITH
CLERK

JEROME N. FRANK
LUBBIE HARPER, JR., ESQ.
JOSEPH I. LIEBERMAN, ESQ. Re: DONNELL COUNSEL V. DOW

Docket No.: 87-7518, 87-7534

Dear Sirs:

The court has handed down a decision in the above-entitled case. The decision of the district court has been affirmed in part and reversed in part.

. . .

Judgment has been entered today and a mandate will issue *ONLY TO THE DISTRICT COURT* in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Very truly yours,

ELAINE B. GOLDSMITH, CLERK

BY:

Gloria Bass
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 308, 319 August Term 1987

(Argued November 16, 1987 Decided June 10, 1988)

Docket Nos. 87-7518
87-7534

DONNELL COUNSEL,

Plaintiff-Appellee,

v.

JOHN DOW, Superintendent of the New Haven Public Schools; NEW HAVEN BOARD OF EDUCATION; DEPARTMENT OF EDUCATION, STATE OF CONNECTICUT; GERALD TIROZZI, Commissioner of Education of the State of Connecticut; and JOYCE C. DRISKELL, Hearing Officer, Connecticut Department of Education,

Defendants-Appellants

Before: KEARSE and ALTIMARI, *Circuit Judges,* and LASKER *District* Judge.[1]

Appeal from a decision of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*), granting an award of attorney's fees.

Affirmed in part and reversed in part.

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[1] Hon. Morris E. Lasker, Senior District Court Judge of the United States District Court for the Southern District of New York, sitting by designation.

LASKER, *District Judge:*

This is an appeal from a decision of the United States District Court for the District of Connecticut (Nevas, J.), awarding plaintiff Donnell Counsel attorney's fees from state and local educational authorities under the Handicapped Children's Protection Act of 1986 ("HCPA"), 20 U.S.C. § 1415(e)(4)(B)-(G) (Supp. IV 1986).

The appeal presents three issues: 1) whether the district court correctly determined that the HCPA's provision for retroactive attorney's fees was validly enacted pursuant to Congress' Spending clause powers and its enforcement power under Section Five of the Fourteenth Amendment; 2) whether the district court applied the proper standard and reached the correct result in determining that section 5 of the HCPA does not violate due process or the Tenth Amendment; and 3) whether the district court correctly determined that Counsel was a "prevailing party" entitled to attorney's fees from the local defendants as well as from the state defendants. We affirm the district court's determinations on the first two issues and reverse the district court on the third issue.

Background

Donnell Counsel is a mildly retarded young adult from New Haven, Connecticut. In April 1985, Counsel initiated an administrative proceeding against the New Haven Board of Education and John Dow, Superintendent of the New Haven Public Schools ("the New Haven defendants") under the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 *et seq.* Counsel sought additional educational services as compensation for a two-year period during which he had been hospitalized in a state mental health facility and received little or no education. In October 1985, the hearing officer concluded that although the New Haven defendants were "fiscally responsible" for Counsel's education during the period in question,

> [b]ecause the Board could not initiate decisions or effect any control over [Counsel's] obtaining an education during [that] time . . ., they have not been negligent in providing for his education. Thus the petitioner has no basis to make a claim for compensatory education from the Board.

Counsel then sought review of this administrative decision in the United States District Court for the District of Connecticut, requesting declaratory and injunctive relief, two years of compensatory education, damages, costs and attorney's fees. Counsel alleged that the New Haven defendants, together with the hearing officer, the Connecticut Department of Education and the Connecticut Commissioner of Education ("the Connecticut defendants"), had 1) wrongfully refused to recognize his right to compensatory education under the EHA, 2) denied him due process, and 3) violated the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*

On July 18, 1986, after successful settlement negotiations between the parties, the district court entered a consent decree. The decree granted Counsel two years of educational services beyond the school year in which he turned twenty-one, to be paid for by the Connecticut defendants. No payments or obligations were imposed on the New Haven defendants. The decree did not make any reference to attorney's fees: at the time the decree was filed, Counsel was precluded from seeking attorney's fees by the Supreme Court's ruling in *Smith v. Robinson*, 468 U.S. 992 (1984), which held that the EHA was the exclusive avenue through which handicapped children could pursue claims against educational authorities and that attorney's fees were not recoverable in actions brought to secure EHA rights.

In August 1986 Congress enacted the Handicapped Children's Protection Act of 1986 ("HCPA"), Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415(e)(4) (Supp. IV 1986)). The HCPA amended § 1415(e)(4) of the EHA to provide explicitly that

> [i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

20 U.S.C. § 1415(e)(4)(B). Section 5 of the HCPA specifies that the attorney's fees provision applies retroactively to any action or proceeding either pending on or brought after July 4, 1984, the day before the date of the decision in *Smith v. Robinson.*[1] In enacting the HCPA, Congress specifically intended to overrule *Smith. See* S. Rep. No. 112, 99th Cong., 2d Sess. 2–3, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1799–1800.

Counsel then moved for attorney's fees under the HCPA. The Connecticut defendants, while conceding that Counsel qualified as a prevailing party against them and that the amount of fees requested was reasonable, argued that Congress had no constitutional authority to make the attorney's fees provision of HCPA retroactive. The New Haven defendants adopted Connecticut's arguments and, in addition, contended that Counsel was not a prevailing party with regard to them.

On May 28, 1987, the district court granted Counsel's motion for attorney's fees against both the Connecticut and New Haven defendants, awarding Counsel $2,633 in fees.[2] *Counsel v. Dow,* 666 F.Supp. 366 (D.Conn. 1987). The court concluded that HCPA § 5 was a valid exercise of Congress'

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[1] HCPA § 5 states in full:

> The amendment made by section 2 shall apply with respect to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1984.

[2] Defendants-appellants do not dipute that the $2,633 fee award is reasonable in amount.

power under both the Spending clause and the Fourteenth Amendment, and that the provision for retroactive attorney's fees was rationally related to a legitimate legislative purpose. 666 F.Supp. at 367–69. In addition, the district court concluded that because "the local defendants . . . concede that the plaintiff obtained a very limited measure of success [against them] at the administrative level," *id.* at 369, it was appropriate to award attorney's fees against the New Haven defendants as well as against the Connecticut defendants.

DISCUSSION

I. Congress' Authority to Enact HCPA § 5

Defendants argue that the HCPA was enacted solely under Congress' Spending clause powers and that under *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), HCPA § 5's provision for retroactive applications for attorney's fees constitutes an abuse of those powers. We conclude both that defendants misread *Pennhurst*'s holding as the Spending clause and that, in any event, *Pennhurst* does not apply because Congress enacted the EHA and HCPA under its powers to enforce the Fourteenth Amendment as well as its Spending clause powers under U.S. Const. art. 1, § 8, cl. 1.

Assuming, *arguendo*, that HCPA was passed solely pursuant to Congress' Spending clause powers, the HCPA's provision for retroactive attorney's fees does not run afoul of the Supreme Court's decision in *Pennhurst*. In *Pennhurst*, the Court considered what it termed a question of "statutory construction," 451 U.S. at 15: whether a provision in a federal-state funding statute, enacted to assist participating states in caring for the developmentally disabled, could be constitutionally interpreted, after the participating states had accepted funding, as imposing enforceable obligations on those states.

In determining this issue, the *Pennhurst* court examined the possible sources of Congress' power to impose such conditions on the receipt of federal funds. After rejecting the argument that the statute in question was enacted pursuant to Congress' powers to enforce the Fourteenth Amendment, 451 U.S. at 15–17, the Court examined the scope of Congress' Spending clause powers. The Court explained that as to

> Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.

Id. at 17 (citations omitted).

Hence, the Court established a "rule of statutory construction" that "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept these funds." 451 U.S. at 24. Applying this principle to the legislation before it, the *Pennhurst* Court concluded that there was no indication in the language of the funding statute or its legislative history to suggest that Congress intended to impose enforceable obligations on participating states.

The Connecticut defendants, relying on language in *Pennhurst* that Congress' power to legislate under the spending power "does not include surprising participating States with postacceptance or 'retroactive' conditions," 451 U.S. at 25,

argue that, under *Pennhurst*, the HCPA's provision for retroactive fee applications pursuant to the EHA is unconstitutional because it operates as a retroactive condition on the grant of EHA funds of which the states were unaware at the time they accepted these funds. However, *Pennhurst*'s holding is not so broad.

Most important, the *Pennhurst* Court was not presented with and did not address the question of the constitutional limits on Congress' Spending clause power to impose an unambiguous retroactive condition on the receipt of federal funds. Rather, the *Pennhurst* Court considered a question of congressional intent: whether ambiguous language in a funding statute could be interpreted, after acceptance of funding by the states, as evidence of congressional intent to impose obligations on the states. While the *Pennhurst* Court noted that "[t]here are limits on the power of Congress to impose conditions on the States pursuant to its spending power," it expressly stated that "[t]hat issue . . . is not now before us." *Pennhurst*, 451 U.S. at 17 n.13. Instead, the Court focussed on the requirement that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* at 17; *cf. South Dakota v. Dole*, 107 S.Ct. 2793, 2796 (1987) (reading *Pennhurst* as articulating one of "several general restrictions" on Congress' spending power: that "if Congress desires to condition the States' receipt of federal funds," it must do so unambiguously).[3]

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[3] Although no other circuit court has addressed the issue of the effect of *Pennhurst* on HCPA § 5, it is significant that those district courts which have considered this challenge to the HCPA's provision for retroactive attorney's fees have rejected defendants' position. *See, e.g., Unified School Dist. No. 259 v. Newton*, 673 F.Supp. 418, 424–25 (D.Kan. 1987); *Capello v. District of Columbia Bd. of Educ.*, 669 F.Supp. 14, 19 (D.D.C. 1987); *Moore v. District of Columbia*, 666 F.Supp. 263, 265 (D.D.C. 1987); *School Bd. of the County of Prince William v. Malone*, 662 F.Supp. 999, 1000–01 (E.D.Va. 1987); *Yaris v. Special School Dist.*, 661 F.Supp. 996, 1001 (E.D. Mo. 1987); *Rollison v. Biggs*, 656 F.Supp. 1204, 1208–09 (D.Del.1987).

Hence, *Pennhurst* cannot be read as broadly prohibiting amendments which add retroactive conditions to funding statutes: at most, *Pennhurst* simply requires a clear indication of congressional intent to impose such conditions. In amending the EHA by enacting the HCPA, Congress explicitly provided that attorney's fees would be available for successful EHA plaintiffs and specified expressly its intent that this condition should apply retroactively to the identifiable two-year period during which awards of EHA attorney's fees had been precluded by the Supreme Court's decision in *Smith*. *Pennhurst* does not bar such an amendment.[4]

Defendants' reliance on *Pennhurst* is further misplaced because *Pennhurst* applies to legislation enacted solely pursuant to Congress' spending powers, and we conclude that the district court correctly determined that Congress enacted and amended the EHA pursuant to its enforcement powers under Section Five of the Fourteenth Amendment as well as its Spending clause powers.[5] In order to establish that

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[4] Connecticut also cites *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), and *Bennett v. New Jersey*, 470 U.S. 632 (1985), in support of its position. In *Bennett*, the Supreme Court considered whether substantive amendments to a funding program could be interpreted to have retroactive application. The *Bennett* court noted that in *Bradley*, the Court had held that a statutory provision for attorney's fees applied retroactively to a fee request that was pending when the statute was enacted unless application of the provision " 'would infringe upon or deprive a person of a right that had matured or become unconditional,' " 470 U.S. at 639 (quoting *Bradley*, 416 U.S. at 720). The *Bennett* Court then reasoned that to apply the substantive amendments in question retroactively would be unfair, and concluded that "absent a clear indication to the contrary in the relevant statutes or legislative history, changes in the substantive standards governing federal grant programs do not alter obligations and liabilities arising under earlier grants." *Id.* at 641. Hence, in *Bennett*, as in *Pennhurst*, the key to whether retroactivity or retroactive interpretation is allowed is whether Congress has made its intentions clear. These cases are not relevant here, where Congress' intent to apply the HCPA retroactively was unambiguous. *See Rollison v. Biggs*, 656 F.Supp. 1204, 1208-09 (D.Del. 1987).

[5] Section Five of the Fourteenth Amendment states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

legislation has been brought under Congress' Fourteenth Amendment enforcement powers, the court must

> be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection."

EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (citations omitted). Although we bear in mind *Pennhurst's* warning that we "should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment," 451 U.S. at 16, the EHA's legislative history makes clear that the EHA has Fourteenth Amendment underpinnings.

While the *Pennhurst* Court concluded that nothing in the language of the statute under consideration or its legislative history suggested "that Congress intended the Act to be something other than a typical funding statute," *Pennhurst*, 451 U.S. at 22, expressing at most "a congressional preference for certain kinds of treatment," *id.* at 19, the language and legislative history of the EHA demonstrate otherwise. The EHA on its face makes a congressional finding that

> it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

20 U.S.C. § 1400(b)(9). Furthermore, views were stated in both Houses of Congress that the EHA was designed to implement the Equal Protection Clause.[6]

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[6] For instance, the Senate Committee wrote that it believed that "Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided

(continued)

In interpreting this legislative history, the Supreme Court has affirmed several times that in enacting the EHA,

> Congress did not content itself with passage of a simple funding statute. Rather, the EHA confers upon disabled students an enforceable substantive right to public education in participating States and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act.

Honig v. Doe, 108 S.Ct. 592, 597 (1988) (citations omitted); *accord Smith v. Robinson*, 468 U.S. 992, 1010 (1984); *Hendrick Hudson Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 750-51 (2d Cir. 1987). Hence we conclude, in accordance with the other courts which have considered the question, that the EHA and the HCPA, which amended it, were enacted pursuant to Congress' powers under § 5 of the Fourteenth Amendment, as well as under its spending powers. *See Crawford v. Pittman*, 708 F.2d 1028, 1036-38 (5th Cir. 1983); *David D. v. Dartmouth School Comm.*, 775 F.2d 411, 421 n.7 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986); *Unified School Dist. No. 259 v. Newton*, 673 F.Supp. 418, 423-24 (D. Kan. 1987); *Yaris v. Special School Dist.*, 661 F.Supp. 996, 1001 (E.D. Mo. 1987); *Tonya K. v. Chicago Bd. of Educ.*, 81 Civ. 580, slip op. at 3-4 (E.D. Ill. July 20, 1987); *St. Louis Dev'l Disabilities Treatment Center Parents' Assoc. v. Mallory*, 591 F.Supp. 1416, 1473-74 (W.D. Mo. 1984), *aff'd*, 767 F.2d 518 (8th Cir. 1985).

In sum, we reject defendants' argument that the HCPA's provision for retroactive availability of attorney's fees was an abuse of Congress' authority under *Pennhurst*, both because

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[6] *(continued)*
equal educational opportunity." S. Rep. No. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1433. *See also Crawford v. Pittman*, 708 F.2d 1028, 1037 n.39 (5th Cir. 1983)(discussing legislative indications that EHA was enacted under the Fourteenth Amendment).

Congress made clear its intent to allow attorney's fees retroactively and because Congress acted pursuant to its Fourteenth Amendment enforcement powers.

II. Standard of Review

In determining whether retroactive legislation of an economic nature violates due process, the Supreme Court has made clear that

> [p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984); *accord, Long Island Oil Products v. Local 553 Pension Fund*, 775 F.2d 24, 27 (2d Cir. 1985). Similarly, any condition on federal grants, whether prospective or retroactive, must be "reasonably related to the federal interest in particular national projects or programs," *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (citations omitted); *accord, Dole*, 107 S.Ct. at 2796.

The Connecticut defendants argue, however, that, in their words, "respect for the sovereignty of the states and the Tenth Amendment" require that the proper test to be applied where the retroactive legislation concerns education — a "sovereign state function" — should be "whether there is a[n] overriding federal interest in the legislation sufficient to justify the involuntary imposition of retroactive obligations on the states."

Defendants appear to argue that this proposition is supported by a "consideration" articulated in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which they claim

survived the Supreme Court's decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), overruling *National League of Cities*. We find no merit in defendants' argument, which both misreads the holding of *National League of Cities* and underestimates the effect of *Garcia* in overruling it. Briefly, *National League of Cities* applied to legislation passed only under the Commerce Clause: the court explicitly stated that it did not consider "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power . . . or § 5 of the Fourteenth Amendment." 426 U.S. at 852, n.17. Furthermore, the Supreme Court has held that "a perceived Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants." *Dole*, 107 S.Ct. at 2797. *See also Gorrie v. Bowen*, 809 F.2d 508, 519 (8th Cir. 1987) (rejecting, under *Garcia*, state's argument that federal conditions on receipt of AFDC regulations violated Tenth Amendment because it "infringes an area traditionally reserved to the state").

Connecticut also argues that even if a "rational basis" test is applied, the district court erred in finding that retroactive awards of attorney's fees under HCPA § 5 could be justified as rationally related to a legitimate purpose. We disagree. In enacting the attorney's fees provision, Congress sought to enforce the EHA by ensuring that the families of handicapped children would be able to find counsel willing to help enforce their rights. The retroactive allowance of attorney's fees furthers that goal in several ways. It assists indigent families with handicapped children by providing legal services organizations who have represented such clients in EHA suits, as here, with the necessary resources and incentive to continue to represent them. Retroactive provision of fees also assists those families who have retained private counsel by helping them to continue with ongoing EHA suits and by correcting the depletion of family resources spent in pursuing successful EHA claims. In addition, it is clear that one of the goals of

the HCPA was to overrule *Smith v. Robinson* legislatively and thus to ensure that parents who brought EHA suits while *Smith* was still the law "may be awarded fees on the same grounds as parents whose action or proceeding [was] brought after the enactment of [the HCPA]." S.Rep. No. 112, 99th Cong., 2d Sess. 15, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1805. "Curative" legislation such as this, which is designed to cure what Congress perceived as a defect in prior law, is entitled to particular deference. *See Temple Univ. v. United States*, 769 F.2d 126, 134 (3d Cir. 1985) (Congress did not violate due process by giving retroactive effect to amendments to social security act which legislatively overruled Supreme Court decision), *cert. denied*, 476 U.S. 1182 (1986); *Tonya K. v. Chicago Bd. of Educ.*, 81 Civ. 580, slip op. at 6 (E.D.Ill. July 20, 1987) (HCPA § 5 entitled to deference as curative legislation intended to overrule *Smith*).

In sum, HCPA's retroactive attorney's fees provision serves the rational purpose of furthering the goals of the EHA by encouraging, assisting and making whole those plaintiffs and attorneys who worked to vindicate the rights of handicapped children under the EHA during the two-year period when the *Smith* decision precluded the award of attorney's fees under the EHA. *See Capello v. District of Columbia Bd. of Educ.*, 669 F.Supp. 14, 18 (D.D.C. 1987) (Congress' rational purpose in enacting HCPA was "to overturn the impact of *Smith* to ensure that all parents, rich or poor, could resort to the courts to vindicate the rights of their handicapped children.").

III. The Fee Award Against the New Haven Defendants

On the basis of the New Haven defendants' concession that Counsel had "obtained a very limited measure of success at the administrative level" against them, the district court concluded that it was "appropriate to award attorneys' fees as to both the state and local defendants." 666 F.Supp. at 369. Accordingly, the New Haven defendants were ordered

to pay 20% of Counsel's fee award.[7] The New Haven defendants challenge the determination that Counsel is entitled to attorney's fees from them, arguing that attorney's fees are unavailable for work done in connection with administrative hearings under the EHA, and that Counsel did not prevail against the New Haven defendants as required by the HCPA.

Under the HCPA, the court may award attorney's fees to any handicapped youth who is the "prevailing party." 20 U.S.C. § 1415(e)(4)(B). A plaintiff is considered a prevailing party for attorney's fees purposes if he succeeds on any significant issue in litigation which achieves some of the benefit the plaintiff sought in bringing suit. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).[8] Here, while Counsel clearly prevailed against the Connecticut defendants with respect to the consent decree, it is difficult to conclude that Counsel "prevailed" against the New Haven defendants, either at the administrative level or in connection with the consent decree, on any significant issue which achieved any benefit sought by Counsel, as required by *Hensley*.

First, we consider the question whether Counsel "prevailed" against the New Haven defendants under the *Hensley* standard through the consent decree which concluded Counsel's federal district court case. It is undisputed that under the consent decree Counsel achieved the relief he sought: two years of compensatory education. However, it is also undisputed that the decree imposes no obligations or expenses

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[7] The Connecticut and New Haven defendants had previously agreed that in the event that a fee award was entered against both sets of defendants, the Connecticut defendants would pay 80% of the award and the New Haven defendants would pay 20%.

[8] Although *Hensley* concerned an award of attorney's fees under 42 U.S.C. § 1988, the *Hensley* standard is "generally applicable in all cases in which Congress has authorized an award of fees to a prevailing party.' " 461 U.S. at 433 n. 7. The Senate Report specifically states that the term "prevailing party" in the HCPA is to be "construed consistent with" the *Hensley* decision. S. Rep. No. 112, 99th Cong., 2d Sess. 13, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1803.

on the New Haven defendants. Although the New Haven defendants signed the decree, only the Connecticut defendants are required to pay for the costs of the compensatory education awarded and no obligations are imposed on the New Haven defendants.

Counsel, citing *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982), argues that he is nevertheless entitled to fees from the New Haven defendants as well as the Connecticut defendants on the basis of the "relative culpability" of the defendants. We disagree. In *Jose P.*, the defendants conceded that they had failed to comply with the statutory requirements of the EHA, and the parties entered into a consent judgment which specified that the state and city defendants — without distinguishing between them — had violated the requirements of federal and New York law. The decree ordered both sets of defendants to take all necessary steps to come into compliance with the law. Under these circumstances, this Court rejected the city defendants' argument that the plaintiffs had not "prevailed" against them under § 1988 as bordering "on the frivolous in light of the judgment finding the state as well as the city defendants in violation of statutory obligations and ordering them to comply." *Jose P.*, 669 F.2d at 871.

Here, in contrast, the consent decree specifically states that none of the defendants admits any liability or violation of Counsel's rights. The district court correctly noted that to attempt to assess "relative culpability" under these circumstances would "require the opposing parties to litigate the merits when the purpose of the consent decree was to avoid litigation of the merits" and "to demand that this court issue what is, in essence, an advisory opinion concerning the merits of a closed case." 666 F.Supp. at 369. We agree that the consent decree provides no basis for an award of attorney's fees from the New Haven defendants.

The district court, however, concluded that it was "appropriate to award attorneys' fees as to both the state and local defendants" because the New Haven defendants

"concede[d] that the plaintiff obtained a very limited measure of success at the administrative level." 666 F.Supp. at 369. Hence, we must also consider the question whether Counsel "prevailed" against the New Haven defendants under the *Hensley* standard at the administrative level.

As an initial matter, the New Haven defendants argue that under the rationale of the Supreme Court's decision in *North Carolina Dep't of Trans. v. Crest Street Community Council, Inc.*, 107 S.Ct. 336 (1986), attorney's fees may not be awarded under any circumstances for legal work done in connection with administrative hearings under the EHA. We disagree.

In *Crest Street,* community groups in a black neighborhood filed an administrative complaint with the United States Department of Transportation, challenging an allegedly race-biased plan to build a highway through their neighborhood. After negotiation, plaintiffs reached a settlement with the state and city defendants. The plaintiffs then filed an action in district court for attorney's fees under 42 U.S.C. § 1988. The Supreme Court, considering only the question "whether attorney's fees under § 1988 can be sought in a court action *other than* litigation in which a party seeks to enforce the civil rights laws listed in § 1988," *Crest Street*, 107 S.Ct. at 340 (emphasis in original), held that the *Crest Street* plaintiffs were not entitled to attorney's fees for work in connection with the negotiations which led to the favorable settlement. The Court found it "entirely reasonable to limit the award of attorney's fees to those parties who, in order to obtain relief, found it necessary to file a complaint in court." *Id.* at 341.

However, the *Crest Street* court explicitly stated that attorney's fees are available "for time spent on administrative proceedings to enforce the civil rights claim prior to the litigation," *Crest Street*, 107 S.Ct. at 341. Here, Counsel seeks attorney's fees for just such a purpose — to recover for time

spent on the administrative hearing which, under the EHA, he was required to pursue prior to bringing a federal court action.[9] *Crest Street* does not bar the award of attorney's fees for work done in an administrative hearing where, as here, attorney's fees are sought for work done in connection with a statutorily required EHA administrative hearing which was followed by a federal court action brought to enforce the plaintiff's rights under the EHA.

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[9] Moreover, the *Crest Street* court concluded that "[t]he legislative history [of § 1988] clearly envisions that attorney's fees would be awarded for proceedings only when those proceedings are part of or followed by a lawsuit," 107 S.Ct. 341. Here, in contrast, the language and legislative history of the HCPA indicate that Congress did intend to make attorney's fees available under the EHA for work done in connection with administrative hearings which are not followed by litigation in court. In fact, the HCPA on its face allows for attorney's fees "[i]n any action or *proceeding*," 20 U.S.C. § 1415(e)(4)(B) (emphasis added), and specifically refers to administrative proceedings in discussing the circumstances under which attorney's fees are available, 20 U.S.C. § 1415(e)(4)(D). These and other indications of congressional intent, *see generally* Schreck, Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act, 60 Temple L. Q. 599, 639–50 (1987) (discussing EHA legislative history), suggest, as all but one of the many courts which have considered this question have concluded, that *Crest Street* does not bar attorney's fees for work done in EHA administrative proceedings even where the subsequent federal court action is brought solely to recover attorney's fees. *See Burr v. Ambach*, 86 Civ. 7164, slip op. at 2–5 (S.D.N.Y. March 9, 1988)(Carter, J.); *Unified School Dist. No. 259 v. Newton*, 673 F.Supp. 418, 422–23 (D.Kan. 1987); *Moore v. District of Columbia*, 666 F.Supp. 263, 265 (D.D.C. 1987); *Burpee v. Manchester School Dist.*, 661 F.Supp. 731, 732–33 (D.N.H. 1987); *Prescott v. Palos Verdes Peninsula Unified School Dist.*, 659 F.Supp. 921, 923–25 & n.3 (C.D. Cal. 1987); *Michael F. v. Cambridge School Dept.*, No. 86-2532-C (D.Mass. March 5, 1987); *see also Dodds v. Simpson*, 676 F.Supp. 1045, 1047 (D.Or. 1987) (allowing attorney's fees for administrative hearing work based on legislative history of HCPA, with no discussion of *Crest Street*); *Kristi W. v. Graham Indep. School Dist.*, 663 F.Supp. 86, 88 (N.D. Tx. 1987) (same); *School Bd. of Prince William County v. Malone*, 662 F.Supp. 999, 1001 (E.D. Va. 1987) (same); *but see Rollison v. Biggs*, 660 F.Supp. 875, 877 (D.Del. 1987) (Crest Street bars HCPA awards for administrative hearings "[b]ecause Congress intended that the HCPA be construed consistent with other fee-shifting statutes. . . .").

There remains the question whether Counsel "prevailed" against the New Haven defendants under the *Hensley* standard at the administrative level. New Haven defendants concede that, as they put it, Counsel had an "extremely limited success" against them in the administrative hearing because the hearing officer found that the New Haven Board of Education was "fiscally responsible" for Counsel's education for the time period in question.

However, we cannot agree with the district court that this concession is sufficient basis for an award of attorney's fees against the New Haven defendants. Although the administrative hearing officer found that New Haven Board of Education was "fiscally responsible" for Counsel's education during the two year period when Counsel was hospitalized in a state mental health facility, she denied Counsel's claim for compensatory education, concluding that

> [b]ecause the Board could not initiate decisions or effect any control over [Counsel's] obtaining an education during the time [in question], they have not been negligent in providing for his education. Thus the petitioner has no basis to make a claim for compensatory education from the Board.

Thus, the hearing officer's limited finding of fiscal responsibility brought Counsel no closer to the relief he sought. Nor is there any discernable connection between the hearing officer's finding as to the New Haven defendants on this issue and the consent decree's award of compensatory education to be paid by the Connecticut defendants.

Under these circumstances, even though New Haven's concession that Counsel enjoyed a "limited success" at the administrative hearing gives us pause, we cannot conclude that Counsel succeeded on any significant issue which achieved any benefit he sought through the administrative hearing against the New Haven defendants. Hence, Counsel

cannot be considered a prevailing party as to New Haven. *See Hensley*, 461 U.S. at 433.

In sum, we conclude that there is no basis for an award of attorney's fees against the New Haven defendants.

Conclusion

For the reasons stated above, the decision of the district court is affirmed as to the Connecticut defendants and reversed as to the New Haven defendants.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DONNELL COUNSEL	)
	)
v.	) CIVIL NO. N-85-557 (AHN)
	)
JOHN DOW, Superintendent of the New Haven Public Schools; NEW HAVEN BOARD OF EDUCATION, STATE OF CONNECTICUT, GERALD TIROZZI, Commissioner of Education of the State of Connecticut; and JOYCE C. DRISKELL, Hearing Officer, Connecticut Department of Education Board of Education	)

JUDGMENT
ON ATTORNEYS' FEES

A Consent Decree having been entered in this case on July 18, 1986, and thereafter a motion for award of attorneys' fees having come on for consideration and was granted as to both the state and local defendants.

It is ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered on the award of attorneys' fees and plaintiff shall recover of the both the state and local defendants the sum of TWO THOUSAND SIX HUNDRED THIRTY-THREE ($2,633.00) DOLLARS. Said sum to be paid no later than June 12, 1987.

Dated at New Haven, Connecticut, this 20th day of August, 1987.

KEVIN F. ROWE

CLERK, UNITED STATES DISTRICT COURT

BY [signature illegible]

DEPUTY IN CHARGE

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DONNELL COUNSEL	:
v.	: Civil No. N-85-557 (AHN)
JOHN DOW, Superintendent of the New Haven Public Schools; NEW HAVEN BOARD OF EDUCATION; DEPARTMENT OF EDUCATION, STATE OF CONNECTICUT; GERALD TIROZZI; Commissioner of Education of the State of Connecticut; and JOYCE C. DRISKELL, Hearing Officer, Connecticut Department of Education	:

RULING ON MOTION FOR ATTORNEYS' FEES

The plaintiff, a young adult who is mildly retarded, brought suit on November 22, 1985, alleging a right to education under the Education for the Handicapped Act ("EHA"), 20 U.S.C. Section 1400 *et seq.*, and alleging a denial of due process and a violation of the Rehabilitation Act of 1973, 29 U.S.C. Section 701 *et seq.* The defendants fall into two groupings: the state defendants, comprised of the Connecticut Department of Education and various state officials; and the local defendants, comprised of the New Haven Board of Education and the superintendent of New Haven public schools. Both the state and local defendants answered the complaint. After negotiations, a consent decree was signed by all parties and entered by the court on July 18, 1986. The decree granted the plaintiff two years of compensatory education at the expense of the state defendants.

On November 3, 1986, the plaintiff filed for attorneys' fees under the Handicapped Children's Protection Act of 1986 ("HCPA"), Pub. L. No. 99-372, 100 Stat. 796, which amended section 615(e)(4) of the EHA as follows:

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped youth who is the prevailing party.

(C) For the purposes of this subsection fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

20 U.S.C. Section 1415(e)(4). President Reagan signed the HCPA into law on August 5, 1986; the provision for attorneys' fees was made retroactive to July 3, 1984, a date immediately before the United States Supreme Court decided *Smith v. Robinson*, 468 U.S. 992 (1984). In *Smith*, the Court found that attorneys' fees are not recoverable under the EHA. *Id.* at 1005. In enacting the HCPA, Congress specifically intended to negate the holding in *Smith*. *See generally* S. Rep. No. 112, 99th Cong. 2d Sess. 2-3 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1799-1800. However, at the time the court entered the consent decree in the instant action, the plaintiff was precluded by *Smith* from seeking attorneys' fees, amounting to $2,633, under the EHA.

The defendants oppose the plaintiff's use of the HCPA as the basis for an attorneys' fees award.[1] They argue that Congress lacked authority to provide for the retroactive appli-

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[1] The state defendants concede that the plaintiff qualifies as a prevailing party and that the claimed fees are reasonable. The local defendants deny that the plaintiff was a prevailing party as to them; their argument will be addressed presently. Only the state defendants fully briefed the contention that the HCPA attorneys' fees provision is unconstitutional, but at oral argument on May 15, 1987, the local defendants adopted the state's argument in the event the court found that the plaintiff had prevailed against them. *See also* Memorandum in Support of Local Defendants' Objection to Plaintiff's Request for Attorney's Fees at 4-5.

cation of the attorneys' fees provision of the HCPA. According to the defendants, Congress enacted the EHA pursuant to its spending power authorization in Article I, Section 8 of the Constitution and, therefore, cannot retroactively change the conditions upon which states receive funding under the EHA. In support of this position, the defendants rely upon *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981) ("*Pennhurst I*"). In *Pennhurst I*, the Court found that Congress acted pursuant to the spending power when it enacted the Developmentally Disabled Assistance and Bill of Rights Act ("Act"), 42 U.S.C. Section 6000 *et seq.* *Id.* at 18. The Court stated

> Unlike legislation enacted under section 5 [of the Fourteenth Amendment], however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." [citations omitted.] There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [citations omitted.] By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id. at 17. The Court found that nothing in the Act's language and structure supported the conclusion that the Act was created pursuant to Congress' power to enforce the Fourteenth Amendment: "[I]t is a mere federal-state funding statute." *Id.* at 18.

The defendants argue that the contract analogy in *Pennhurst I* applies with equal force to the EHA. Under this reasoning, Congress breached the contract when it authorized retroactive attorneys' fees in the HCPA: There was no mutual assent to imposition of such an obligation on the state at the time the contract was formed. The defendants' reliance on *Pennhurst I* is misplaced, however. The *Pennhurst I* Court explicitly excluded discussion of Congress' authority to impose affirmative obligations on the states under the spending power or the Fourteenth Amendment. 451 U.S. at 10–11. The Court focused on Congressional intent as to an ambiguity in the Act, not on retroactive legislation. Thus, the defendants may not rely on *Pennhurst I* for the proposition that Congress may never pass retroactive legislation under its spending power. The court concludes that even if the EHA were passed solely under the spending power, the retroactive provisions of the HCPA do not exceed Congress' power under the circumstances in this case.

Moreover, in drawing the contract analogy between the Act and the EHA, the defendants presuppose that Congress enacted the EHA entirely under its spending power. However, language in the EHA and in its legislative history demonstrates that the legislation rests, at least partially, on a Fourteenth Amendment underpinning. Paragraph 9 of Congress' Findings states: "[I]t is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure *equal protection of the law*." 20 U.S.C Section 1400(b)(9) (emphasis added). There is no comparable language in the legislation involved in *Pennhurst I*. The legislative history of the EHA contains the following:

> The Committee rejects the argument that the Federal Government should only mandate services to handicapped children if, in fact, funds are appropriated in sufficient amounts to cover the full cost of this education. The Committee recognizes the State's [sic; States'] primary responsibility to uphold the

> constitution of the United States and their own State Constitutions and State laws *as well as the Congress' own responsibility under the 14th Amendment to assure equal protection of the law.*

S. Rep. No. 168, 94th Cong., 2d Sess. 22 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1446 (emphasis added). Congressional intent could not be more clear that the EHA, and the HCPA by implication, was enacted pursuant to section 5 of the Fourteenth Amendment.[2]

The standard of review for economic legislation enacted under the Fourteenth Amendment is the rational basis test.

> [T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by a rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. . . .

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984) (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15–16 (1976)). It is not difficult to conclude that Congress' decision to allow retroactive awards of attorneys' fees under the EHA was rationally related to a legitimate legislative purpose: Congress wished that "a parent or legal representative [of a handicapped child] should be free to select and be represented by the attorney of his/her choice." S. Rep. No. 112, 99th Cong., 2d Sess. 13 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1803. Thus, the court finds

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[2] In *Smith v. Robinson*, 468 U.S. 992 (1984), the Court makes numerous references to the fact that the EHA is "not simply a funding statute." *Id.* at 1010. The Court also held that in cases where the EHA is applicable, the plaintiff may not bring a separate equal protection claim: "Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education." *Id.* at 1013.

that the provision of the HCPA making attorneys' fees retroactive is constitutional.[3]

The issue as to whether the plaintiff is entitled to attorneys' fees from the local defendants as well as from the state defendants is more difficult. On the one hand, it is undisputed that the plaintiff obtained the relief he sought. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). On the other hand, it is arguable that he did not obtain that relief from the local defendants: the state must bear the cost of the plaintiff's compensatory education. Furthermore, the plaintiff attempts to justify attorneys' fees against the local defendants on a "culpability theory," but the plaintiff himself concedes that "at first blush, culpability in this case might appear difficult to assign, given the purpose of a Consent Decree to *avoid* assigning or accepting culpability." Plaintiff's Response to Court Order of March 5, 1987 (filed Apr. 6, 1987) at 15 (emphasis in original). Despite the plaintiff's assertion that such culpability is "clear" from the record in this case, such a view depends upon this court's endorsement of the plaintiff's view of the merits of this case. Such an approach appears to require the opposing parties to litigate the merits when the purpose of the consent decree was to avoid litigation of the merits. It also appears to demand that this court issue what is, in essence, an advisory opinion concerning the merits of a closed case.

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[3] At oral argument, counsel for the state defendants presented the court with a recent case, *Abu-Sahyun v. Palo Alto Unified School District*, 1986-87 EHLR Dec. 558: 275 (decided March 3, 1987), in which a federal district court in the Northern District of California ruled that the retroactivity provision of the HCPA did not support an award of attorneys' fees pursuant to a settlement agreement. The court based its holding on policy grounds alone: retroactive awards of attorneys' fees will discourage the making of settlement agreements. *Id.* at 558: 277. Of major importance to the court was the reasonableness of the attorneys' fees sought — $55,000. On this fact alone the *Abu-Sahyun* case is distinguishable from the instant one. The reasonableness of the $2,633 sought by plaintiff's counsel is not in question. In addition, the court never addressed the constitutionality of the HCPA retroactivity provision. Thus, *Abu-Sahyun* offers limited persuasive authority for the present controversy.

However, the local defendants do concede that the plaintiff obtained a very limited measure of success at the administrative level.[4] In *Burpee v. Manchester School District,* Civ. No. 86-531-D slip op. (D.N.H. Feb. 12, 1987) and *Michael F. v. Cambridge School Department,* Civ. No. 86-2532-C slip op. (D. Mass. Mar. 5, 1987), two courts concluded that attorneys' fees under the EHA are available for plaintiffs who prevail at the administrative hearing level. Those decisions are fully persuasive. Accordingly, the court finds it appropriate to award attorneys' fees as to both the state and local defendants. The defendants have agreed such an award should be apportioned between them, *see* State Defendant's Response to March 5, 1987 Order (filed April 7, 1987) at 15, in the following manner: 80% from the state defendants and 20% from the local defendants.

Conclusion

The plaintiff's motion for attorneys' fees is granted as to both the state and local defendants. In accordance with this opinion, the defendants shall pay the plaintiff their full proportionate shares of $2,633 by no later than June 12, 1987.

SO ORDERED this 28 day of May 1987, at Hartford, Connecticut.

/s/ Alan H. Nevas

Alan H. Nevas
United States District Judge

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[4] Before filing suit, the plaintiff sought relief, pursuant to 20 U.S.C. Section 1415, in an administrative hearing before an official of the Connecticut Board of Education. The local defendants were involved in that administrative process. On October 23, 1985, the hearing officer denied the plaintiff compensatory education. That denial resulted in the federal suit that produced the consent decree underlying this motion for attorneys' fees.

Handicapped Children's Protection Act of 1986, P.L. 99-372, Sections 2 and 5

AWARD OF ATTORNEYS' FEES

SEC. 2. Section 615(e)(4) of the Education of the Handicapped Act is amended by inserting "(A)" after the paragraph designation and by adding at the end thereof the following new subparagraphs:

"(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

"(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

"(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if —

"(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins:

"(ii) the offer is not accepted within ten days; and

"(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

"(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

"(F) Whenever the court finds that —

"(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

"(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

"(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

"(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of this Act".

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EFFECTIVE DATE

SEC. 5. The amendment made by section 2 shall apply with respect to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1984.

Education of the Handicapped Act (relevant portions)

20 U.S.C. § 1400

Congressional statements and declarations

Short title

(a) This chapter may be cited as the "Education of the Handicapped Act."

Findings

(b) The Congress finds that —

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met:

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the National interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

Purpose

(c) It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in Section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. § 1401

Definitions

(a) As used in this chapter —

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired,

visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

* * *

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

* * *

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool,

elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I or title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act.

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

(23) (A) The term "public or private nonprofit agency or organization" includes an Indian tribe. (B) The terms "Indian", "American Indian", and "Indian American" mean an individual who is a member of an Indian tribe. (C) The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act).

(b) For purposes of part C of this title, "handicapped youth" means any handicapped child (as defined in section 602(a)(1)) who —

(1) is twelve years of age or older; or

(2) is enrolled in the seventh or higher grade in school.

NOTE: (a) Except as provided in subsection (b), the provisions of this Act shall take effect on the date of enactment of this Act.

(b)(1) To the extent that the amendments made by this Act to parts C, D, E, and G of the Education of the Handicapped Act prohibit or limit the use of funds, such amendments shall apply only to funds obligated after the date of enactment of this Act.

(2) As determined necessary by the Secretary of Education for purposes of providing services under the Education of the Handicapped Act pending the issuance of regulations

implementing the amendments made by this Act, the Secretary shall provide financial assistance under parts C, D, E, and G of the Act as in effect on the day before the date of enactment of this Act until issuance of such regulations or March 1, 1984, whichever is earlier.

20 U.S.C. § 1412

Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that —

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than

September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied to any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children,

and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

20 U.S.C. § 1413

State Plans

Requisite features

(a) Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall —

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2) and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 241c-1 of this title, section 844a(b)(8) of this title or its successor authority, and section 1262(a)(4)(B) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this chapter, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the in-service training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purposes of this chapter are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

(4) set forth policies and procedures to assure —

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that public agency will administer such funds and property;

(7) provide for (A) making such reports in such form and containing such information as the Secretary may require to carry out his functions under this subchapter, and (B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this subchapter (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to handicapped children under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Secretary may waive in part the requirement of this clause if he concurs with the evidence provided by the State;

(10) provide consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title;

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this subchapter, and (C) assists the State in developing and reporting such data and evaluations as may assist the Secretary in the performance of his responsibilities under section 1418 of this title;

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to (A) define the financial responsibility of each agency for providing handicapped children and youth with free appropriate public education, and (B) resolve inter-agency

disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of this agreement;

(14) policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this subchapter are appropriately and adequately prepared and trained, including —

(A) the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services, and

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State.

Additional assurances

(b) Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

Notice and hearing prior to disapproval of plan

(c) The Secretary shall approve any State plan and any modification thereof which —

(1) is submitted by a State eligible in accordance with section 1412 of this title; and

(2) meets the requirements of subsection (a) and subsection (b) of this section.

The Secretary shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

Participation of handicapped children in private schools

(d)(1) If, on the date of enactment of the Education of the Handicapped Act Amendments of 1983, a State educational agency is prohibited by law from providing for the participation in special programs of handicapped children enrolled in private elementary and secondary schools as required by subsection (a)(4), the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a)(4).

(2)(A) When the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may not exceed the Federal amount provided per child under this part to all handicapped children enrolled in the State for services for the fiscal year preceding the fiscal year for which the determination is made.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this

subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirement of subsection (a)(4).

(3)(A) The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or his designee to show cause why such action should not be taken.

(B) If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(e) This Act shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act with respect to the provision of a free appropriate public education for handicapped children within the State.

20 U.S.C. § 1414

Application

Requisite features

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall —

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which —

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including —

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that (A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this subchapter;

(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives) as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs carried out under this subchapter; and

(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general

public, and provide that all evaluation and reports required under clause (3) shall be public information;

(5) provide assurance that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provision of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(b)(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Secretary under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under

subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall —

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

(3) In carrying out its function under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

* * *

Programs using State or local funds

(f) Notwithstanding the provisions of subsection (a)(2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

20 U.S.C. § 1415

Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedure; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to —

> (A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, available, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit —

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under

subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection

for services performed subsequent to the time of a written offer of settlement to a parent or guardian if —

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more then ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that —

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding;

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 1415 of this Act.

(f) Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.

* * *

20 U.S.C. § 1416

Withholding of payments; judicial review

(a) Whenever the Secretary, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds —

(1) that there has been a failure to comply substantially with any provision of section 1412 or section 1413 of this title, or

(2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Secretary (A) shall, after notifying the State educational agency, withhold any further payments to the State under this subchapter, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. If the Secretary withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this subchapter to specified local educational agencies or intermediate educational units affected by the failure. Until the Secretary is satisfied that there is no longer any failure to comply with the provisions of this subchapter, as specified in clause (1) or clause (2), no further payments shall be made to the State under this subchapter or under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this subchapter shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

(b)(1) If any State is dissatisfied with the Secretary's final action with respect to its State plan submitted under section 1413 of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for

review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. the Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(2) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

UNITED STATES CONSTITUTION (relevant portions)

Article I, Section 8, cl. 1

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Respectfully Submitted,

STATE OF CONNECTICUT, ET AL.

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No. 88-484

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF CONNECTICUT, *et al.*,

Petitioners,

against

DONNELL COUNSEL,

Respondent.

Brief of the Attorneys General of the States of New York, Wisconsin and Florida, *Amici Curiae*, Urging That the Petition for a Writ of Certiorari be Granted

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Dated: October 7, 1988

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No. 88-484

IN THE

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OCTOBER TERM, 1988.

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DONNELL COUNSEL,

Respondent.

Brief of the Attorneys General of the States of New York, Wisconsin and Florida, *Amici Curiae,* Urging That the Petition for a Writ of Certiorari be Granted.

Interest of the State of New York.

The Education For All Handicapped Children Act of 1975, Public Law 94-142, 89 Stat 773, (the EHA) provides federal grants to assist State and local agencies in educating handicapped children 20 USC § 1411(a)(1). Funding is contingent upon State compliance with mandated goals and procedures, the eligibility requirements. 20 USC § 1412. States "desiring to participate in the program"

must file a State plan, approved by the United States Commissioner of Education, which sets forth in detail the goals, programs and timetables as well as the State's specific procedures for the provision of a free appropriate education to all handicapped children within its borders. 20 USC §§ 1412, 1413. New York has adopted such a State plan. At the time that it did so, the EHA did not contain any provision for the award of attorney's fees. *See Smith v. Robinson,* 468 US 992 (1984). The congressional response to that case was the "Handicapped Children's Protection Act of 1986", Public Law 99-372, 100 Stat 796, approved August 5, 1986, which generally provides for the award of EHA attorney's fees. Section 5, in attempting to override *Robinson,* provided that:

> "Sec. 5. The amendment made by section 2 shall apply with respect to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1984." 100 Stat 798.

A New York court has applied the EHA attorney's fees provisions retroactively in two cases in which unappealed final judgments, without costs, were issued February 6, 1986, six months before the approval of Public Law 99-372. They are *Matter of Esther C. v. Ambach,* 135 New York Misc 2d 997, 515 NYS2d 997 (Sup Ct Albany County 1987); *Matter of Sidney K. v. Ambach,* ____ Misc 2d ____, unreported (Sup Ct Albany County 1987). Appeals are pending in both cases before the New York Supreme Court, Appellate Division, Third Judicial Department. New York has a community of interest with the State of Connecticut because it is urging in State court that:

"Section 5 of Public Law 99-372 is an unconstitutional exercise of the Congress' spending power."

Reasons for granting the writ.

The judgment of the Court of Appeals should be reviewed because that court erred in holding that the retroactive application of the EHA attorney's fee award provision to closed cases is valid under (A) the spending power, and (B) the enforcement powers set out in section 5 of the Fourteenth Amendment (849 F2d 731).

A.

Upon signing the 1986 legislation, President Reagan noted his "serious reservations" as to its retroactive application to cases that were no longer pending. Such application, he stated, disturbs "settled expectations" and concepts of "traditional finality". Nor could he discern a rational basis for imposing fees in cases, like those in Connecticut and New York, already settled or finally adjudicated. However, he signed the measure "notwithstanding the constitutional problems it presents" (22 Weekly Compilation of Presidential Documents 1050, August 11, 1986, reprinted at 1986 US Code Cong & Admin News, Vol 4, p 1811). We support Connecticut because we do not believe that Congress could constitutionally impose that obligation in cases such as *Counsel* and those arising in New York in which final consent decrees or final judgments were rendered prior to August, 1986.

The thrust of the EHA is "to provide financial assistance to the States for improved educational services for handicapped children" (Senate Report No. 94-168, 94th

Cong, 1st Sess, reprinted at 1975 US Code Cong & Admin News, Vol 2, p 1425). It has been held to be an exercise of Congress' spending power (Article I, § 8, cl 1 of the Constitution). *Hendrick Hudson Bd. of Ed. v. Rowley,* 458 US 176 at 190, n 11, 204, n 26 (1982). In *Pennhurst State School v. Halderman,* 451 US 1 (1980), the Court articulated definitive, substantive criteria governing decision in spending power cases. They require that a statute which unilaterally attempts to change Congress' bargain with participating States by imposing unnegotiated conditions upon them, as does the EHA attorney's fee provision, be held to be unconstitutional. In *Pennhurst* the Court concluded that Congress may fix the terms on which it will disburse federal moneys to the states, and

> "[u]nlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' * * * There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. * * * By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." 451 US at 17 (footnote and citations omitted).

The Court put the test as "whether Congress spoke so clearly that we can fairly say that the state could make an informed choice. *Id.* at 25.

It is thus evident that, under *Pennhurst,* the appropriate inquiry is whether the EHA, as enacted in 1975, gave notice to Connecticut and New York that they were required to pay EHA attorney's fees as a condition to receiving federal monies. The obvious answer is that there was no such condition. *Smith v. Robinson, supra,* 468 US 992.[1]

The *Counsel* court, however, has attempted to pigeon-hole the case by holding that it "simply requires a clear indication of congressional intent to impose [retroactive] conditions". It concluded that since Congress had "specified expressly its intent that this condition should apply retroactively", *Pennhurst* was not a bar. 849 F2d 731 at 736. This Court's *Pennhurst* holding, we urge, has more substance than the Court of Appeals appears willing to have ascribed to it. That fact was acknowledged by that court in citing *South Dakota v. Dole,* ____ US ____, 107 S Ct 2793, 2796 (1987) as:

> "(reading *Pennhurst* as articulating one of 'several general restrictions' on Congress' spending power: that 'if Congress desires to condition the States' receipt of federal funds,' it must do so unambiguously)" (p 736).

Thus we urge that the retroactive imposition of attorney's fees for closed cases imposes an obligation that the States were not bound to accept if they elected not to participate in the Federal program. *See,* also, *Bennett v. New Jersey,* 470 US 632 (1985). The Congress cannot validly change its bargain with participating States unilaterally by imposing such a new and unexpected condition upon

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[1]While several lower courts have rejected this position (*see Counsel v. Dow,* 849 F2d at 736, n 3), we urge that those cases were wrongly decided.

them. *Pennhurst State School v. Halderman, supra; see also, Bell v. New Jersey,* 461 US 773, 790 n 17 (1983).

B.

The *Counsel* court buttressed its decision by holding that Congress had also acted pursuant to its Fourteenth Amendment enforcement powers. 849 F2d at 737. This Court, however, has not held that Congress did so. While, as observed below, the Court has stated that the EHA confers an enforceable right to public education, it has carefully noted that such a right exists in participating States. *Honig v. Doe,* US , 108 S Ct 592, 597 (1988).[2]

In *Pennhurst* the Court also discussed "the appropriate test" for determining when Congress intends to enforce Fourteenth Amendment guarantees. It stated that its holdings had "involved statutes which simply prohibited certain kinds of state conduct" (451 US at 16) and that the EHA, like the Developmentally Disabled Assistance and Bill of Rights Act, at issue in that case, was one of "several laws designed to improve the way in which this Nation treats the mentally retarded" (p 31). It rejected claims that Congress intended, in 42 USC § 6010, to create enforceable rights and obligations either under its Fourteenth Amendment enforcement powers or as mandatory requirements, as a condition for receiving federal monies, under its spending power (451 US at 17, 18). The Court concluded that "nothing suggests that Congress in-

[2]Several courts have held that Congress acted pursuant to its powers to enforce the Fourteenth Amendment. These include *Capello v. Dist. of Col. Bd. of Educ.*, 669 F Supp 14 (DDC 1987); *Tonya K. v. Chicago Bd. of Ed.*, not reported in F Supp, 1987 WL 14699 (ND Ill), *affd* 847 F2d 1243 (7th Cir 1988); *Yaris v. Special School Dist.*, 661 F Supp 996 (ED Mo 1987); *Laura I. v. Clausen*, 676 F Supp 717 (MD La 1988); *also Gary A. v. New Trier High School Dist.*, 796 F2d 940 (7th Cir 1986). We urge that those case were wronqly decided.

tended the Act to be something other than a typical funding statute" (p 22) and it rejected "scattered bits of legislative history" (p 20) including "the general discussion of equal protection guarantees in the Senate Report" (*idem*). Plainly, Congress had not acted pursuant to section 5 of the Fourteenth Amendment because it was not intended to place duties on the States independent of their participation in the Act. That is precisely the case here. The EHA does not place any affirmative duties upon nonparticipating states. Nor does it prohibit any kind of State conduct. Rather it encourages the States to act.

The EHA, like other grant programs, is based upon principles of "cooperative federalism". *See,* e.g., *David v. Dartmouth School District,* 775 F2d 411, 419 (7th Cir 1985), *cert denied,* 475 US 1140 (1986); *Town of Burlington v. Dept. of Educ.,* 736 F2d 773, 783-784 (1st Cir 1984), *affd,* 471 US 359 (1985). *Compare Pennhurst State School v. Halderman, supra,* 451 US at 22. The imposition of attorney's fees upon closed cases undermines that cooperative federalism concept. *Compare Conn. Dept. of Income Maint. v. Heckler,* 471 US 524, 532 n 22 (1985). Section 5 of Public Law 99-372, as applied to Connecticut and to New York, is an unconstitutional exercise of the spending power.

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be granted.

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